

¹ ALJ's order, page 2, second paragraph, third sentence.

The ALJ's Preliminary Decision contained a summary of the evidentiary record and the following pertinent paragraph:

The court finds that an evaluation of claimant's complaints of low back pain should be performed by a qualified orthopedic surgeon. Therefore, Dr. Glen Amundson is appointed to conduct such an examination and report his findings with regard to causation, treatment recommendations and work status to the undersigned. Should the doctor establish causation, he is authorized to treat claimant. Respondent is directed to schedule the examination at the doctor's earliest convenience. The parties are directed to prepare a joint letter confirming this appointment and enclose relevant medical records. There should be no further contact with the doctor by any party until his report is received by the court. Costs of the evaluation are assessed against respondent.

Interestingly, respondent appealed the decision apparently based upon the assumption that the ALJ's decision determined the claim compensable.

K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.²

In light of the jurisdictional framework set forth above, the ALJ's Preliminary Decision presents a perplexing scenario. The ALJ has the authority to refer claimant to Dr. Amundson for the purposes of conducting an IME. And her decision to do so is not an appealable issue.³ But the language contained within the Preliminary Decision indicates the ALJ inappropriately delegated to the physician the ultimate determination of whether

² See K.S.A. 44-551. Neither party alleges the ALJ exceeded her jurisdiction in this instance.

³ *Davenport v. Marcon of Kansas, Inc.*, Nos. 1,034,647 & 1,043,900, 2009 WL 3191384 (Kan. WCAB Sept. 21, 2009); *Dodson v. Peoplease*, No. 1,042,494, 2009 WL 1314337 (Kan. WCAB Apr. 09, 2009).

claimant's alleged injuries arose out of and in the course of employment.⁴ An ALJ has not only the jurisdiction but also the *duty* to make an independent adjudication of the facts.⁵

Although the ALJ can request a causation opinion from the physician, it is the ALJ who must then consider that evidence in conjunction with the entire evidentiary record and make the decision whether claimant's injuries were caused by the work-related accident. The ALJ has the statutory authority and duty to make factual determinations in workers compensation cases. That power is vested by statute in the ALJ and cannot be delegated to the physician. It is impermissible for the ALJ to delegate the statutory duty to determine the issue of causation in a worker's compensation case and when, as here, that ultimate decision is improperly delegated, that act gives the Board jurisdiction on appeal. Consequently, the third sentence in the above quoted ALJ's decision constitutes an impermissible delegation of the ALJ's statutory authority, exceeds the jurisdiction of the ALJ and is stricken from the Preliminary Decision.

With that finding, this Board member concludes that the balance of the Preliminary Decision does not contain an appealable issue, as it merely directs Dr. Amundson to perform an IME and holds in abeyance any further findings until receipt of his report. Accordingly, the Preliminary Decision, with the exception of the third sentence of paragraph 2 on page 2 which is hereby stricken, remains in full force and effect.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁷

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Marcia L. Yates Roberts dated February 23, 2010, is modified to strike the third sentence of paragraph 2 on page 2 and otherwise, remains in full force and effect.

IT IS SO ORDERED.

⁴ Sosa v. Joy Masonry, Inc., No. 1,034,940, 2007 WL 4662030 (Kan. WCAB Dec. 31, 2007).

⁵ See K.S.A. 44-523; K.S.A. 44-534; K.S.A. 44-534a; and K.S.A. 44-551.

⁶ K.S.A. 44-534a.

⁷ K.S.A. 2009 Supp. 44-555c(k).

Dated this _____ day of April 2010.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Jeffrey A. Mullins, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge